

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DEDIRE HAWKINS

Claimant

VS.

GENERAL MOTORS CORPORATION

Self-insured Respondent

Docket No. **1,040,262**

ORDER

Respondent requested review of the September 14, 2009 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on December 8, 2009.

APPEARANCES

Michael R. Wallace of Shawnee Mission, Kansas, appeared for the claimant. Peter J. Chung of Kansas City, Missouri, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed claimant suffered a 15 percent permanent partial disability to her right upper extremity and further agreed the only dispute on the left upper extremity was the percentage of disability she suffered for her left cubital tunnel syndrome.

ISSUES

It was undisputed that Diedre Hawkins developed bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome as a result of her repetitive work activities for the respondent. Treatment for her injuries included bilateral carpal tunnel releases. Surgical left lateral and medial epicondylar releases as well as a left ulnar nerve subcutaneous transposition were also performed. Hawkins returned to work for the respondent after she reached maximum medical improvement.

The parties were unable to agree upon the nature and extent of disability Hawkins suffered as a result of her injuries and that was the sole issue litigated before the Administrative Law Judge (ALJ). The ALJ found Hawkins suffered a 20 percent permanent partial disability to her left arm and a 15 percent permanent partial disability to her right

arm based upon ratings provided by Dr. Edward J. Prostic. The ALJ specifically determined that the rating opinion offered by Dr. Paul Nassab was not persuasive.

Respondent requests review of the nature and extent of disability. Respondent argues that the ALJ should have factored the rating opinion of Dr. Nassab into the final determination of Hawkins' disability.

Hawkins argues the ALJ's Award should be affirmed.

Because Hawkins returned to work for wages equal to or more than her average gross weekly wage at the time of her injury, she is not entitled to an award of permanent total disability.¹ The sole issue for Board determination is the nature and extent of Hawkins' K.S.A. 44-510d disability to her bilateral upper extremities.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

Briefly stated, Dr. Craig Newland performed bilateral carpal tunnel surgery on Hawkins. After the surgeries, she was still having problems with her elbows so respondent referred her to Dr. Paul Nassab. The doctor ordered physical therapy and then he performed surgery on Hawkins' left elbow. After additional physical therapy she was released from treatment and returned to work for respondent at a comparable wage.

Hawkins continues to have numbness in her fingers and hands with difficulty holding small objects without dropping them. She also has noted a decrease in strength in both hands. She has sensitivity to touch as well as pain in her left elbow which occasionally locks up. And she experiences pain on the inner side of her right elbow.

K.S.A. 44-510d(a)(23) provides:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the

¹ See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, rehearing denied (May 8, 2007).

American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Dr. Edward Prostic, board certified orthopedic surgeon, performed an evaluation of Hawkins at her attorney's request. On April 10, 2009, the doctor updated Hawkins' medical history, reviewed her medical records and performed an examination. Dr. Prostic opined that Hawkins sustained repetitious trauma to her upper extremities due to her work-related injury. Based upon the *AMA Guides*², Dr. Prostic rated Hawkins' right upper extremity at 15 percent and her left upper extremity at 20 percent. Dr. Prostic explained the difference in his ratings for the right and left upper extremities was based upon his findings that Hawkins had minimal right cubital tunnel whereas she had significant residuals from the cubital and carpal tunnel surgeries on the left. Dr. Prostic rated Hawkins at 10 percent bilaterally for the carpal tunnel and for the cubital tunnel he assigned 5 percent for the right and 10 percent for the left.

Dr. Paul Nassab, board certified orthopedic surgeon, examined and evaluated the claimant at respondent's attorney's request. On July 16, 2008, Dr. Nassab performed a physical examination and reviewed medical records. Hawkins had pain in both elbows. Dr. Nassab later performed surgery on claimant's left elbow which included debriding or removing degenerative tendon from the inside/outside of her elbow and freeing up the nerve on the backside of her elbow. Claimant reached maximum medical improvement on March 9, 2009. Interestingly, Dr. Nassab issued a report dated August 11, 2009, that rated Hawkins' bilateral upper extremities at 6 percent. But he later testified, based upon the *AMA Guides*, that Hawkins suffered a 2-3 percent impairment to the left upper extremity for mild neuropathy.

The ALJ adopted the opinion of Dr. Prostic and noted that Dr. Nassab's opinion was not persuasive. The ALJ analyzed Dr. Nassab's opinion in the following fashion:

Dr. Nassab testified about the claimant's impairment only relative to the cubital tunnel syndrome, which he treated. Nassab said the claimant had 3% or "something around there" impairment of the left upper extremity. He acknowledged that he issued a written report less than a month before his deposition which stated 6% bilaterally, but still testified that the impairment should be 2% or 3% of the left arm only. Dr. Nassab's testimony did not seem very clear and was not considered persuasive.³

Respondent argues the ALJ misconstrued Dr. Nassab's testimony and that the doctor provided a 6 percent rating for Hawkins' left upper extremity. The Board disagrees.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³ ALJ Award (Sep. 14, 2009) at 3.

As noted by the ALJ, Dr. Nassab issued a report which rated Hawkins bilateral upper extremities at 6 percent. But when the doctor testified he noted the *AMA Guides* provide a 10 percent rating for mild cubital tunnel neuropathy but that Hawkins rating was not the full 10 percent because her symptoms had improved and her actual rating was about 2 or 3 percent. Upon further questioning the doctor noted that his 6 percent rating in his report was only for the left upper extremity as the bilateral rating was a mistake. He then again further explained that he gave 3 percent or somewhere around that number for the left upper extremity.

The Board agrees that in this instance Dr. Prostic's opinion is more persuasive and is adopted.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated September 14, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Peter J. Chung, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge